Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1993

IN THE MATTER OF THE SEARCH OF
1638 E.2ND STREET, TULSA, OKLAHOMA,

JOHN LAWMASTER,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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35 pp

## QUESTIONS PRESENTED FOR REVIEW

Whether the government may invoke the informer's privilege to shield wrongdoers from liability for their misconduct.

Whether, absent any criminal prosecution or investigation, there is a First Amendment or common law right of access to search warrant materials following execution and filing with the court clerk.

Whether the requirement of a preliminary showing of falsity in an affidavit for a search warrant, as set forth in this Court's opinion of *Franks v. Delaware*, is applicable when there is no criminal prosecution.

Whether district courts should summarily refuse an application to unseal search warrant materials, without affording a hearing to the applicant, whenever the government has claimed the informer's privilege.

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**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

## PETITION FOR WRIT OF CERTIORARI

Petitioner John Lawmaster respectfully requests that a writ of certiorari issue to review the judgment and opinion entered in this case by the United States Court of Appeals for the Tenth Circuit on May 20, 1993.

## OPINIONS BELOW

The May 20, 1993 opinion of the United States Court of Appeals for the Tenth Circuit is reported at 993 F.2d

773 (10th Cir. 1993), and is set forth in the Appendix to this Petition at A1-A7.

The order of the United States District Court for the Northern District of Oklahoma, dated July 31, 1992, on remand from the Court of Appeals, modified a prior order and refused to grant the relief sought by the petitioner. This unreported order is set forth in the Appendix to this Petition at A13-A14.

The order of the United States District Court for the Northern District of Oklahoma, dated March 23, 1992, affirmed prior orders of the Magistrate Judge and refused to grant the relief sought by the petitioner. This order was modified on remand from the Court of Appeals. It is an unreported order, set forth in the Appendix to this Petition at A15-A17.

The unreported order of a United States Magistrate Judge for the Northern District of Oklahoma, dated March 4, 1993, which refused to grant the relief sought by the petitioner, is set forth in the Appendix to this Petition at A18.

## JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered an opinion in this case on May 20, 1993. No petition or suggestion for rehearing was submitted to the Court of Appeals. This petition for a writ of certiorari is taken from the May 20, 1993 opinion of the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner's claim is based, in part, upon the following constitutional rights:

### U.S. CONST., AMEND. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

### U.S. CONST., AMEND. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## STATEMENT OF THE CASE

This case arises from petitioner's desire to learn why his home was ransacked by agents of the United States Treasury Department's Bureau of Alcohol, Tobacco and Firearms. The agents had obtained a warrant to search for a machine gun or parts to make a machine gun. The

search was fruitless, and agents left a note which said "Nothing Taken! *ATF.*"

Petitioner was recently divorced at the time of the search. His ex-wife had informed him that she had a means to bring misery to his life. At the time his home was searched, petitioner was attending to the modification of an insurance policy at the request of his ex-wife. For these reasons, and because petitioner had never owned, stored or illegally possessed any automatic weapon, or parts to make such a weapon, he immediately suspected that his ex-wife had something to do with the search.

Petitioner telephoned the local office of the Bureau of Alcohol, Tobacco and Firearms. He spoke with the agent who was named as affiant on a copy of the search warrant which was left at his home. Petitioner inquired why his home was searched, and he complained about the damages. The agent refused to talk on the telephone with petitioner, but petitioner was invited to come to the local office for a face to face meeting. Petitioner responded that he intended to seek legal counsel prior to such a meeting. The agent informed petitioner that if he got an attorney, there would be no meeting. Petitioner chose to forego the meeting, and he retained counsel to assist in learning exactly why the search warrant was issued.

Upon learning that the affidavit and all materials regarding the issuance of the search warrant had been sealed, petitioner's counsel applied to the United States Magistrate Judge to unseal the records. The application asserted that the search was wrongful and that petitioner had retained counsel to investigate the factual base(s)

upon which petitioner might present a claim or lawsuit. The application noted that the search warrant may have been based on false representations made to investigating authorities. The application requested either the setting of a hearing on the issue, or an order unsealing the record, instanter.

The U. S. Attorney's office objected to the unsealing of the records. In response to petitioner's application, the government argued that district courts had authority to seal the records to prevent the compromise of an ongoing investigation; that petitioner had no standing to request unsealing; that the government's need to protect the identity of an informant must be balanced against the defendant's interest and that if a hearing was to be held, the government requested that it be held *in camera*.

The Magistrate Judge entered an order, without findings, denying petitioner's request to unseal the records. A18.

Petitioner moved the District Court to overrule the order of the Magistrate Judge. A brief supporting the motion urged petitioner's claim that he sought redress against individuals or agencies for what he asserted to be a wrongful raid on his home. The brief also asserted a First Amendment right of access to the materials and a right of access provided by Rule 41(g) of the Federal Rules of Criminal Procedure.

The District Court ruled that it had authority to continue to seal the record; that a hearing was unnecessary; that an ongoing investigation might be jeopardized and that unsealing the affidavit might make the person(s) involved in the investigation vulnerable to reprisal.

A15-17. The District Court's failure to conduct a hearing resulted in two serious errors. First, absent a hearing, the District Court was unable to determine that there was no ongoing investigation. Second, because the District Court denied petitioner the forum of a hearing, petitioner was prevented from making any showing of right or need to overcome informer's privilege.

Petitioner appealed to the Court of Appeals for the Tenth Circuit. After petitioner's brief was filed, the government successfully moved for remand to the District Court. A9. On remand, the government made the District Court aware that there was no ongoing investigation of petitioner at the time the District Court upheld the continuation of the seal order. The District Court entered a modified order which deleted reference to an "ongoing investigation," but the continued sealing of the record was upheld. A13-A14. The District Court also ordered the unsealing of an ex parte memorandum of the government. A12. In the ex parte memorandum, the government advised that there was no longer an ongoing investigation, but that the government remained concerned about the possibility of reprisal against the informant.

A few days prior to oral argument before a Tenth Circuit panel, the government presented petitioner's counsel with a redacted version of the affidavit for the search warrant. Counsel was asked to accept the redacted version and dismiss the appeal, but counsel was not allowed to retain possession of the redacted version of the affidavit. After consultation with counsel, petitioner determined that the redacted version of the affidavit contained no substantial basis for the search warrant, other than what was supplied by a confidential informant. The

redacted version of the affidavit confirmed petitioner's allegation that an informant had lied. There was no basis to confirm the informant's reliability in the redacted version of the affidavit, and it appeared that the informant was indeed petitioner's ex-spouse. Petitioner declined to dismiss his appeal.

At oral argument, the Tenth Circuit panel directed the government to provide petitioner's counsel with a copy of the redacted version of the affidavit, and to file a copy with the court. The Tenth Circuit affirmed the District Court in its opinion at 993 F.2d 773 (10th Cir. 1993). A1-A7. Finding that the government had properly invoked the informer's privilege recognized by *Roviaro v. United States*, 353 U.S. 53 (1957), the Tenth Circuit considered whether petitioner was able to overcome the privilege. Petitioner's asserted right of access was characterized as a common law qualified right of access, which is trumped by the government when it properly invokes the informer's privilege. A4-A5. In response to petitioner's argument that *Franks v. Delaware*, 438 U.S. 154 (1978), recognized the implication of a Fourth Amendment right in the situation where a search warrant affidavit contained false information, the government argued that petitioner had failed to make a sufficient preliminary showing entitling him to a *Franks* hearing. The Tenth Circuit agreed, and determined that because petitioner alleged that the informant, rather than the affiant, had lied, petitioner was not entitled to a *Franks* hearing. A5-A6. The Tenth Circuit decided that petitioner's alleged need for the search warrant affidavit was satisfied by production of the redacted version. Finally, the Tenth Circuit concluded that petitioner's asserted need for the

unredacted affidavit was so slight, that it would not overcome the informer's privilege invoked by the government.

The Tenth Circuit's opinion did not address the First Amendment right of access asserted by the petitioner. Other than determining that petitioner would not have been entitled to a hearing under *Franks v. Delaware, supra,* the Tenth Circuit opinion did not address petitioner's claim that unsealing of the search warrant materials was necessary to allow petitioner an opportunity to vindicate his Fourth Amendment interest. Also in response to petitioner's argument that he should have been afforded a hearing in the district court, the Tenth Circuit's opinion refused to adopt a rule requiring a district court to hold an *in camera* hearing whenever the identity of an informant is requested. A6. The Tenth Circuit opinion implicitly rejected petitioner's argument that the government bore the burden of demonstrating a compelling interest sufficient to outweigh public policy favoring access to court records.

Following oral argument, the government applied to the District Court for permission to disclose a copy of the redacted version of the search warrant affidavit to petitioner's counsel. The application was granted. A11. The government also moved for permission to file the redacted version of the affidavit with the clerk of the Tenth Circuit. The motion was granted, and the clerk was directed to file under seal the redacted version of the search warrant affidavit. A8.

## REASONS FOR GRANTING THE WRIT

### I. THE TENTH CIRCUIT'S DECISION THAT INFORMANT PRIVILEGE IS SUPERIOR TO PETITIONER'S RIGHT OF ACCESS TO COURT RECORDS IS IN CONFLICT WITH RULINGS OF OTHER CIRCUITS AND THE SUPREME COURT.

The Eighth Circuit has held that there is a qualified First Amendment right of public access to documents filed in support of search warrants, and that the documents may be sealed if the district court specifically finds that sealing is necessary to protect a compelling government interest and that less restrictive alternatives are impracticable. *In Re: Search Warrants for Secretarial Area Outside Office of Gunn,* 855 F.2d 569 (8th Cir. 1988).

The Ninth Circuit finds no constitutional or common law right of access to search warrant materials during the pendency of an investigation. *Times Mirror Company v. United States,* 873 F.2d 1210 (9th Cir. 1989).

The Fourth Circuit has held that, although there is no First Amendment right of public access, there is a common law qualified right of public access to warrant materials. *Baltimore Sun Company v. Goetz,* 886 F.2d 60 (4th Cir. 1989). If there is a common law right, but no constitutional right of access to warrant papers, the decision to enter a seal order is left to the sound discretion of the district court. *Id.*

The Tenth Circuit, citing *Goetz,* accepted petitioner's argument that the press and the public have a common law qualified right of access to judicial records, and that affidavits for search warrants are judicial records. *Lawmaster v. United States,* 993 F.2d 773 (10th Cir. 1993);

A4-A5. Petitioner's claimed right of access was then disposed of by reference to the *Times Mirror* opinion, and to the Seventh Circuit's holding that there is no right of access to documents which have traditionally been kept secret for important policy reasons. *United States v. Corbitt,* 879 F.2d 224 (7th Cir. 1989). *Corbitt* involved the sealing of presentence investigation records.

In concluding that the search warrant materials should remain sealed, the Tenth Circuit found that petitioner had not made the required showing of need for the unredacted affidavit. A7; but

> [I]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. . . . American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies, and in a newspaper publisher's intention to publish information concerning the operation of government. *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 597-598 (1978)

In opposition to petitioner's assertion of his right of access to court records, the government asserted the informer's privilege as the basis for continued sealing of the search warrant affidavit. Petitioner also urged that his Fourth Amendment interest was implicated by the presence of false statements contained in the affidavit for the

search warrant. *See Franks v. Delaware,* 438 U.S. 154 (1978). Instead of balancing the interests asserted by the parties, the Tenth Circuit determined that the informer's privilege trumped petitioner's right of access. A5.

Informer's privilege was the subject of the Court's opinion in *Roviaro v. United States,* 353 U.S. 53 (1957). "The scope of the privilege is limited by its underlying purpose" 353 U.S. at 60; and "[w]here the disclosure of an informant's identity, . . . is essential to a fair determination of a cause, the privilege must give way." 353 U.S. at 60-61. The Seventh Circuit determined that "the privilege is qualified; it yields when the identification of an informant . . . is essential to a balanced measure of the issues and the fair administration of justice." *Dole v. Local 1942, IBEW,* 870 F.2d 368, 372 (7th Cir. 1989).

A redacted version of the search warrant affidavit was provided to petitioner's counsel. The redacted version not only tends to confirm petitioner's well-founded suspicions of malicious conduct on the part of his ex-wife, but the redacted version provides no other factual basis for the issuance of a search warrant. Even if petitioner's ex-wife is not the informant, petitioner now knows that the informant either lied or was misrepresented by the affiant. The question arises whether, by invoking informer's privilege, the government is shielding a wrongdoer from accountability for her or his misconduct.

The purpose of the informer's privilege is the furtherance and protection of the public interest in effective law enforcement. *Roviaro,* 353 U.S. at 59; but application

of the privilege in petitioner's case, frustrates the exposure and prosecution of persons who made false statements resulting in the issuance of the search warrant. It is difficult to conclude how the public interest is furthered by application of the privilege in petitioner's case.

## II. THE TENTH CIRCUIT'S DECISION TO UPHOLD THE DISTRICT COURT'S ORDER DENYING PETITIONER A HEARING MISCONSTRUED AND MISAPPLIED THIS COURT'S RULE IN *FRANKS v. DELAWARE.*

The Court of Appeals determined that petitioner might have made a sufficient showing of need to overcome the informer's privilege. A3-A4. Because the District Court afforded no hearing to petitioner, however, petitioner had no real opportunity to make any showing regarding his need for the sealed warrant materials. Moreover, petitioner was unable to make a substantial preliminary showing that the affiant knew of or recklessly disregarded the falsity of the informant's information because petitioner had no access to the affidavit.

The Court of Appeals upheld the denial of a hearing by reference to *Franks v. Delaware,* 438 U.S. 154 (1978). A5-A6. *Franks* was a criminal case involving the application of the exclusionary rule to search warrants based on affidavits containing false statements by the affiant. The requirement in *Franks* that a substantial preliminary showing be made by a criminal defendant as a prerequisite to obtaining a hearing on a motion to suppress is clearly inapplicable to petitioner's claim.

By relegating petitioner's claim that he has a Fourth Amendment interest in obtaining vindication for the destructive and wrongful search of his home to the procedural requirements of *Franks v. Delaware,* the Court of Appeals has misapplied the *Franks* ruling. This is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

## CONCLUSION

It is appropriate for the Court to exercise its discretion to grant certiorari in this case. The Tenth Circuit's opinion on the subject of access to court records is in conflict with opinions of other Circuit Courts of Appeals. Decisions of the Fourth, Eighth and Ninth Circuit, on the issue of public access, were in conflict even prior to the Tenth Circuit's ruling in petitioner's case. The Tenth Circuit's opinion that informer's privilege trumps petitioner's right of access conflicts with this Court's ruling in *Nixon v. Warner Communications, Inc.* The Court should exercise its discretion to prevent the application in non-criminal cases of procedural prerequisites to obtaining a hearing on a motion to suppress evidence.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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|---|---|---|
| IN THE MATTER OF THE SEARCH OF 1638 E. 2ND STREET, TULSA, OKLAHOMA. | ) | |
| JOHN LAWMASTER, Appellant, | ) | No. 92-5092 |
| v. | ) | (Filed May 20, 1993) |
| UNITED STATES OF AMERICA, Appellee. | ) | |

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Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 92-C-232-B)

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Steven L. Sessinghaus, Tulsa, Oklahoma, for Appellant.

Allen J. Litchfield, Assistant United States Attorney (Tony M. Graham, United States Attorney, with him on the brief), Tulsa, Oklahoma, for Appellee.

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Before LOGAN, MOORE, and ANDERSON, Circuit Judges.

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LOGAN, Circuit Judge.

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Appellant John Lawmaster appeals the district court's denial of his motion to unseal an affidavit supporting a search warrant that was executed on his residence. The search proved fruitless, and appellant now seeks to discover the identity of the informant who provided the information used to obtain the search warrant.

I

Agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) obtained and executed a search warrant for appellant's home, based on allegations from an informant that appellant was in possession of an illegal firearm. After searching appellant's house, the agents found no such weapon although they apparently found numerous legal firearms. *See* Appellant's App. at 20. The agents left the house without removing any of appellant's property. The government moved to seal the affidavit, claiming that the sealing was necessary to protect the ongoing investigation and because the informant feared reprisal from appellant. The magistrate judge granted the government's motion.

Appellant then petitioned the district court to overrule the magistrate judge's order and to release the affidavit. Following some confusion over the basis upon which the government sought to keep the affidavit sealed,[1] the district court ultimately affirmed the magistrate judge's ruling, from which appellant took the

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[1] Initially, the government asserted that the seal was required to protect an ongoing investigation. Following the district court's decision, however, the government notified the court that the investigation had terminated, and that the only

instant appeal. We review the district court's decision for an abuse of discretion. *In re the Application and Affidavit for a Search Warrant*, 923 F.2d 324, 326 (4th Cir.), *cert. denied*, 111 S. Ct. 2243 (1991); *United States v. Mann*, 829 F.2d 849, 853 (9th Cir. 1987).

II

The government cites the informer's privilege as the basis for keeping the affidavit under seal and the informer's identity secret. Under that privilege, "the state is normally entitled to refuse to disclose the identity of a person who has furnished information relating to an investigation of a possible violation of law." *Hoffman v. Reali*, 973 F.2d 980, 987 (1st Cir. 1992). "The underlying concern of the doctrine is the common-sense notion that individuals who offer their assistance to a government investigation may later be targeted for reprisal from those upset by the investigation." *Dole v. Local 1942, IBEW*, 870 F.2d 368, 372 (7th Cir. 1989). The government is entitled to assert the privilege without showing that reprisal or retaliation is likely. *Id.*

The informer's privilege is not absolute, however. If the party seeking disclosure makes a proper showing of need, the privilege will give way. It will yield "when the identification of the informant or of a communication is essential to a balanced measure of the issues and the fair administration of justice. The party opposing the privilege may overcome it upon showing his need for the

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reason to maintain the seal was to protect the informant from reprisal.

information outweighs the government's entitlement to the privilege." *Id.* at 372-73 (citations omitted).

In most circumstances, the party seeking disclosure is the defendant in a criminal case, who wants the informant's identity to assist in his or her defense. In such cases, if "the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, . . . the privilege must give way." *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). However, the privilege is applicable in civil cases as well. *United States v. One 1986 Chevrolet Van*, 927 F.2d 39, 43 (1st Cir. 1991). Here, appellant has not been indicted, nor is he threatened with later prosecution. His motion is therefore civil in nature, although no civil suit has been filed.[2] In such cases, the informer's privilege is arguably stronger, because the constitutional guarantees assured to criminal defendants are inapplicable. *Dole*, 870 F.2d at 372.

Appellant argues that he is entitled to the affidavit under the common law right of access to the courts. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). We agree that "the press and the public have a common law qualified right of access to judicial records," *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 65 (4th Cir. 1989), and that "affidavits for search warrants are judicial

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[2] Appellant apparently contemplates some form of legal action against the informant once his or her identity is made known. Notwithstanding the lack of an ongoing proceeding, appellant has standing to seek the affidavit as the aggrieved subject of a fruitless search under the Fourth Amendment standing doctrine of *Rakas v. Illinois*, 439 U.S. 128 (1978), and its progeny.

records," *id.* at 64. However, although "the common law right of access creates a strong presumption in favor of public access to materials submitted as evidence in open court, this presumption should not apply to materials properly submitted under seal." *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989) (internal quotation and citation omitted); *see also Times Mirror Co. v. United States*, 873 F.2d 1210, 1219 (9th Cir. 1989) ("[T]here is no right of access to documents which have traditionally been kept secret for important policy reasons."). Thus, when the government properly invokes the informer's privilege, it trumps the common law right of access to judicial records as to the identity of the informant.

Appellant further argues that he was entitled to a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). This argument fails for a number of reasons. First, *Franks* is premised upon a potential showing of a Fourth Amendment violation in a criminal case, in which case the defendant would be entitled to the suppression of illegally obtained evidence. Here, appellant is merely an interested party, not a criminal defendant, and so is not subject to criminal sanctions based on the search of his home. Second, to qualify for a *Franks* hearing, appellant must have made a substantial showing that the affiant knew of, or recklessly disregarded, the falsity of the informant's information. *United States v. Bloomgren*, 814 F.2d 580, 584 (10th Cir. 1987). Appellant does not challenge the actions of the police; he merely seeks the identity of the informant. Appellant alleges no impropriety on the part of the affiant, ATF Agent P. Blair Ward. Third, *Franks* itself states that "[t]he deliberate falsity or reckless disregard whose impeachment is permitted today is only

that of the affiant, not of any nongovernmental informant." 438 U.S. at 171. Thus, appellant's allegations of false statements made to the affiant by the informant do not entitle him to a hearing.[3]

Finally, we note that shortly before oral argument, the government provided appellant with a redacted version of the affidavit. This version states that the informant knew that appellant had purchased an illegal weapon, that the informant had observed appellant firing it in automatic mode, that appellant had carried the weapon in several different vehicles, and that the gun could be found in a green military gun case. Whatever need appellant has demonstrated for the affidavit, and it is slight, is satisfied by production of the redacted version. In situations such as this, a redacted version should be made available if doing so would not reveal the informant's identity or prejudice an ongoing investigation. *See Coughlin v. Lee*, 946 F.2d 1152, 1159-60 (5th Cir. 1991). The

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[3] The district court declined to hold an in camera hearing on appellant's motion. We agree with the Fifth Circuit that "[a]n *in camera* hearing may be helpful in balancing these interests, but we refuse to adopt a rule requiring a district court to hold an *in camera* hearing whenever the identity of an informant is requested." *United States v. Alexander*, 559 F.2d 1339, 1344 (5th Cir. 1977) (Citation Omitted), *cert. denied*, 434 U.S. 1078 (1978). If the district court holds such a hearing, it may, if necessary, file its findings and reasoning under seal to preserve the confidentiality of the informant's identity yet still provide for meaningful appellate review. *See In re Search Warrant for Secretarial Area Outside Office of Thomas Gunn*, 855 F.2d 569, 574 (8th Cir. 1988), *cert. denied*, 488 U.S. 1009 (1989).

government has produced a redacted version of the affidavit, and is required to do no more under these circumstances.

Appellant states that he "needs" the unredacted affidavit because he might pursue legal action against the informant. Appellant confuses "need" with "want." Although we do not here attempt to define the contours of the showing required to overcome the informer's privilege, appellant's contemplation of a suit against the person who caused law enforcement agents to search his home will not cause the privilege to yield. The government has rightfully asserted the privilege, and appellant has not made the required showing of need for the unredacted affidavit.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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|---|---|---|
| IN THE MATTER OF THE SEARCH OF 1638 E. 2ND STREET, TULSA COUNTY, TULSA, OKLAHOMA 74120, | ) | |
| Plaintiff – Appellant, | ) | [No. 92-5092] |
| v. | ) | |
| UNITED STATES OF AMERICA, | ) | |
| Defendant – Appellee. | ) | |

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ORDER

Filed March 10, 1993

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Before LOGAN, MOORE, and ANDERSON, Circuit Judges.

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The court grants appellee's motion to file supplemental materials and orders the clerk to file under seal the redacted version of the search warrant affidavit.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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|---|---|---|
| IN THE MATTER OF THE SEARCH OF 1638 E. 2ND STREET, TULSA COUNTY, OKLAHOMA 74120, | ) | |
| Plaintiff – Appellant, | ) | No. 92-5092 |
| v. | ) | |
| UNITED STATES OF AMERICA, | ) | |
| Defendant – Appellee. | ) | |

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ORDER

Filed July 28, 1992

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Before SEYMOUR and BRORBY, Circuit Judges.

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Appellee's motion for a remand is granted. This matter is remanded to the district court for the limited purpose of disposing of the pending motion to reconsider. The parties shall notify this court immediately that the district court ruled or shall file simultaneous status reports on or before September 28, 1992.

Failure of appellant to file a status report is grounds for dismissal without further notice.

Entered for the Court

ROBERT L. HOECKER, Clerk

/s/ Patrick Fisher
Patrick Fisher, Chief Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>v.<br>IN THE MATTER OF THE SEARCH OF 1638 EAST SECOND STREET, TULSA, TULSA COUNTY, OKLAHOMA, 74120, JOHN LAWMASTER,<br>Defendant. | **UNDER SEAL**<br>No. 91-119-M |

**ORDER**

The Court has before it the United States of America's Application for Limited Disclosure of a Redacted Version of the Affidavit for Search Warrant filed in the above styled and numbered case. The Court, finding in good cause, directs that a redacted version in the form as attached to the government's Application for Limited Disclosure, be disclosed to defense counsel for purposes of settlement negotiations in the above styled and numbered case. Further the Court orders that its original order sealing the affidavit for search warant [sic] is to remain in full force and effect.

Date: 3/5/93

/s/ JOHN LEO WAGNER
UNITED STATES
MAGISTRATE JUDGE

JOHN LEO WAGNER
United States Magistrate
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>PREMISES KNOWN AS: 1638 EAST SECOND STREET, TULSA, TULSA COUNTY, OKLAHOMA, SINGLE FAMILY RESIDENCE, THE FRONT DOOR OF THE RESIDENCE FACES EAST,<br><br>Defendant. | ) | No. 92-C-232-B<br><br>(Filed Aug. 10, 1992) |

**ORDER**

The Court has before it the plaintiff's Application to Unseal Ex Parte Memorandum Regarding Matters Referred to in Court Order dated March 23, 1992. Upon application, for good cause, the Court finds that the Ex Parte Memorandum regarding matters referred to in Court Order dated March 23, 1992 and filed on April 6, 1992, should be unsealed.

IT IS SO ORDERED.

/s/ THOMAS R. BRETT
THOMAS R. BRETT
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>PREMISES KNOWN AS: 1638 EAST SECOND STREET, TULSA, TULSA COUNTY, OKLAHOMA, SINGLE FAMILY RESIDENCE, THE FRONT DOOR OF THE RESIDENCE FACES EAST,<br><br>Defendant. | ) | No. 92-C-232-B<br><br>(Filed Jul. 31, 1992) |

## ORDER

This case was remanded from the Tenth Circuit Court of Appeals for "the limited purpose of disposing of the pending motion to reconsider." The Court assumes the referenced pending motion is the request for modification of the Order of March 23, 1992 in plaintiff's Ex Parte Memorandum of April 6, 1992. In its memorandum plaintiff informed the Court that an investigation of John Lawmaster was no longer in progress and requested that the Court delete the reference to an "ongoing investigation" on page 2 of the Order, "if the Court feels it necessary to modify its Order."

As reflected in the Order of March 23, 1992, the Court based its denial of the appeal of the Magistrate Judge's Order sealing the record relating to a search warrant executed at 1638 E. 2nd Street, Tulsa, Oklahoma, 74120 on two grounds: the ongoing investigation of John Lawmaster and the possibility of reprisal directed toward the

affiant. Plaintiff's correction of the record concerning the "ongoing investigation" did not alter the Court's decision as the possibility of reprisal remained. The Court, therefore, did not modify its Order.

In order to clarify the Court's decision in the Order of March 23, 1992, the Court modifies the first paragraph of the Order to read as follows:

> Following a review of the record, the Court concludes the applicant's request should be denied because the unsealing of the affidavit in support of the search warrant might make the person or persons involved in the investigation vulnerable to reprisal. Therefore, the Court DENIES applicant's request for unsealing said documents.

IT IS SO ORDERED, this 31st day of July, 1992.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

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| In the Matter of the Search of 1638 E.2nd St. Tulsa, Tulsa County, Oklahoma 74120 | Case No. 91-119-M 92-C-232-B (Filed Mar. 23, 1992) |

**ORDER**

Before the Court for decision is the appeal from the Magistrate Judge's Order denying John Lawmaster's application for order unsealing the record relating to a search warrant executed at 1638 East 2nd Street, Tulsa, Oklahoma 74120. The record reveals a proper supporting affidavit on search warrant, pursuant to application, and issuance of the search warrant filed on December 12, 1991. An Order sealing same was entered on December 20, 1991, and it was further provided that such sealed order "shall not expire automatically as provided in Local Rule 15.1."

The record further reveals the subject search warrant was executed on December 16, 1991, at 10:55 A.M. at the subject residence. A copy of the subject warrant was left at the unoccupied residence by Alcohol, Tobacco & Firearms Special Agent Blair Ward. The return of the subject search warrant revealed "no items taken." Attachment B to the search warrant revealed a description of the personal property that was the subject of the search.

The applicant, John Lawmaster, resides at the subject residence and seeks unsealing of the record in order to

learn the underlying basis for the issuance of the subject search warrant, asserting same was unlawfully issued.

The Government objects to the unsealing of the record, asserting that to do so would jeopardize the ongoing investigation. Following a review of the record, the Court concludes the applicant's request should be denied because an ongoing investigation could be jeopardized and the Court further notes that the unsealing of the affidavit in support of the search warrant might make the person or persons involved in the investigation vulnerable to reprisal. Therefore, the Court DENIES applicant's request for unsealing said documents.

Authority supporting the Magistrate Judge's sealing order and the Court's decision herein is as follows: Fed.R.Crim.P. 16(d)(1); *Sherrick v. Eyman*, 389 F.2d 648 (9th Cir. 1968); *see, United States v. Averell*, 296 F.Supp. 1004 (E.D. N.Y. 1969); *Shea v. Gabriel*, 520 F.2d 879 (1st Cir. 1975); *In re Braughton*, 520 F.2d 765 (9th Cir. 1975); *United States v. Agosto*, 600 F.2d 1256 (9th Cir. 1979); *Orosco v. United States*, 526 F.Supp. 756 (W.D.Okla. 1981); and, *see, United States v. Dyba*, 554 F.2d 417 (10th Cir. 1977).

Any hearing herein in reference to the appeal of the Magistrate Judge's seal order would be held *in camera* pursuant to *United States v. De Los Santos*, 810 F.2d 1326 (5th Cir. 1987). The Court having reviewed the record and considered the application, supporting briefs and legal authorities, determines that a hearing is unnecessary. The application of John Lawmaster for an order unsealing record related to the search warrant filed on February 20,

1992 is hereby DENIED and the prior orders of the Magistrate Judge are hereby affirmed.

DATED this 23rd day of March, 1992.

/s/ Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

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|---|---|---|
| In the Matter of the Search of 1638 E. 2nd St. Tulsa, Tulsa County, Oklahoma 74120 | ) ) ) | Case No. 91-119-M |

**ORDER**

The application presented by counsel for John Lawmaster to unseal records relating to the search warrant is denied.

Dated this 4th day of March, 1992.

/s/ John Leo Wagner
JOHN LEO WAGNER
UNITED STATES
MAGISTRATE JUDGE